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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RAUL ARMONDO CARRILLO, Defendant and Appellant.	E047571 (Super.Ct.No. RIF131258) OPINION

APPEAL from the Superior Court of Riverside County. Larrie R. Brainard, Judge. (Retired judge of the San Diego Sup. Ct., assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.) Affirmed.

Judith Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Theodore M. Cropley, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Raul Armondo Carrillo appeals from judgment entered following a jury

conviction for first degree murder (Pen. Code, § 187[1]). The jury also found true a gun enhancement (§ 12022.53, subd. (d)). The trial court sentenced defendant to 50 years to life in state prison.

Defendant contends the trial court committed constitutional error by admitting into evidence inadmissible hearsay under the adoptive admission exception. Defendant argues the hearsay statement did not qualify as an adoptive admission.

We conclude there was no prejudicial error and affirm the judgment.

1. Statement of Facts

In mid-June 2006, defendant and Jesus Enrique Aregon attended a party, during which Jose Robles and Victor Soriano witnessed defendant loan Aregon $100.

On July 4, 2006, Robles, Aregon, and brothers, Victor Soriano (Victor) and Julio Soriano (Julio), attended a party at the home of Arleen Garcia. At 8:30 p.m. defendant arrived at the party even though he was uninvited. Defendant told Victor he wanted to know where Aregon was because Aregon owed him $100. Victor told defendant Aregon was in the back.

After sitting and drinking beer with others at the party for about 20 minutes, defendant went to his car and retrieved a sawed-off shotgun. For about 15 minutes, defendant sat with the loaded gun either in his lap or between his knees and feet, with the barrel pointed toward the ground. Defendant said he was going to shoot the gun at 11:00

[1] Unless otherwise noted, all statutory references are to the Penal Code.

p.m. for the Fourth of July. Aregon was not sitting with the group. He was walking around the area, talking on his cell phone.

Garcia told defendant to take the gun back to his car because it could cause an accident. A little later, after Robles overheard Victor tell Julio defendant was at the party to collect $100 Aregon owed him, defendant got up and left with his gun. Robles saw him with Aregon by a truck and car parked in the driveway. Defendant was holding his gun. Defendant and Aregon were behind the car for about five minutes. Then Robles heard what sounded like a firecracker. Robles and Victor got up from their chairs and found Aregon on the ground by the truck. Robles saw defendant drive away in his car. Defendant was the last person Robles saw Aregon with before the shooting.

Louise Reyna, who was at the party, testified defendant came up to the group she was with at the party and sat with them. He was not invited to the party. At one point he went to his car and returned with a sawed-off shotgun. He sat down with the gun on his lap. Before defendant went to get his gun, Julio and Arleen left the group and went to Garcia's car in the driveway. Reyna could hear music coming from Garcia's car. The music was not real loud.

After defendant was told to put his gun back in his car, and defendant left with his gun, Reyna heard a shotgun fire. She and others ran over to the driveway where they heard the gun fired. She saw Aregon on the ground. Reyna saw defendant walking away to his car and drive off. Reyna did not hear him say anything, such as call 911.

Garcia testified that during the party, before defendant retrieved his gun from his car, she and Julio went to her car to get some CDs. They sat in the car listening to music for 10 or 15 minutes. The police were called at 10:00 p.m.

Aregon died of a close-range gunshot wound to the head. The coroner determined the end of the shotgun barrel was within inches of Aregon's skull when fired and the barrel was pointed straight at Aregon, with a slight tilt upward.

Gilberto Olvera, Jr., testified that during the evening Aregon was shot, defendant left his car in Olvera's backyard. Defendant told Olvera he was leaving the car there because he was drunk. Defendant never returned for his car. Two weeks later Olvera reported the abandoned car to the police, who removed the car from Olvera's yard. The police found in the car a shotgun with blood spatter.

A ballistics expert determined that the shotgun had a standard trigger-pull and a safety mechanism which ensured it would not discharge accidentally. Also, the hammer had to be cocked for the gun to discharge. Another expert, who was a forensic firearms examiner, determined the trigger-pull was two pounds but would not discharge by itself if it was dropped.

Anita Hermosillo, a guest at the party, testified that while she was sitting with the others, including defendant, Aregon approached the group and said he wanted to talk to defendant. Defendant and Aregon walked away together toward the driveway. They walked out of sight and about five minutes later, Anita heard someone yell, "Somebody killed somebody."

2. Adoptive Admission

Defendant contends the trial court erred in admitting Robles's hearsay testimony that he overheard Victor tell Julio defendant came to the party to collect $100 Aregon owed him. Based on an offer of proof, the court overruled defendant's objection, ruling that, although hearsay, evidence of the conversation was admissible under the adoptive admission exception.

A. Background Facts

During Robles's trial testimony, Robles stated that Victor told him defendant wanted the money defendant had loaned to Aregon. Defense counsel objected on hearsay grounds. The trial court sustained the objection and ordered the testimony stricken. The prosecutor argued the testimony was admissible as showing motive under Evidence Code section 1250.

The matter was discussed out of the presence of the jury. The prosecutor explained that the testimony showed that defendant's motive for shooting Aregon was that defendant wanted Aregon to repay $100 Aregon borrowed from defendant. Defense counsel objected that the double hearsay violated defendant's right to confront his accusers and witnesses.

The court conducted an evidentiary hearing under Evidence Code section 402 (402 hearing), during which the attorneys examined Robles. Robles testified he was present when defendant loaned Aregon $100 about 22 days before the shooting. On July 4, 2006, Robles heard Victor say to Julio that defendant was there to get his money. Defendant at the time was sitting down with the group at the party. Julio was with Arleen playing

music in her car. Robles doubted defendant, who was sitting with the group, heard Victor's statement to Julio.

The prosecution argued the statement was admissible as an adoptive admission because there was evidence defendant heard the statement and did not deny it. The court agreed the statement might qualify as an adoptive admission if there was evidence defendant heard it.

Robles further testified at the 402 hearing that he was sitting three feet away from Victor when he heard Victor's statement to Julio. Defendant was sitting with the group about 12 feet away. Victor and Julio were speaking in a low tone and Victor was turned away from defendant when he made the statement to Julia. Robles assumed defendant did not hear Victor's statement because, if he had, defendant would have reacted differently.

The prosecutor argued that determination of whether defendant heard the statement and whether it thus was an adoptive admission was for the jury to decide based on the facts.

The court concluded Robles's testimony provided evidence of motive and there was sufficient evidence supporting a finding that Victor's statement was an adoptive admission. Such determination was for the jury to decide. The court ruled Robles could testify regarding Victor's statement to Julio and facts relevant to determining whether the statement qualified as an adoptive admission.

Examination of Robles in the presence of the jury resumed. Robles testified that, while he was sitting with the group, he overheard Victor talking to Julio. Victor had gone

over to talk to Julio, who was in Garcia's car with Garcia listening to music. Robles was sitting in a chair that was leaning against Garcia's car. Defendant was also sitting with the group in a chair about 12 feet away from Julio. While Victor was standing outside the car, Robles heard Victor say that defendant was there to get his $100 back from Aregon. Robles assumed defendant did not hear Victor because defendant did not react.

Defense counsel again objected. In response, the court instructed the jury at length on whether to consider the testimony, as follows:

"If you conclude that someone made a statement outside of court that accused the defendant of a crime or tended to connect the defendant with the commission of the crime and the defendant did not deny it, you must decide whether each of the following is true:

"No. 1, the statement was made to the defendant or made in his presence;

"No. 2, the defendant heard and understood the statement;

"And No. 3, the defendant would under all the circumstances naturally have denied the statement if he thought that it was not true;

"And No. 4, that the defendant could have denied it but did not.

"If you decide all these requirements have been met, you may conclude that the defendant admitted the statement is true. If you decide that any of these requirements was not met – have not been met, you must consider – you must not consider either the statement or the defendant's response for any purpose.

"Now, you'll note that I'm telling you that so the issue of whether he heard it and should have responded or could have responded or did respond or didn't respond is a factual determination for the jury to make. But those are the rules.

"Now, if you determine that he didn't hear it and so forth, then it's just truly hearsay from a third party being said, and it's not admissible, and you should not consider that statement of Victor's. All right? Does that make sense to you? If you consider that Mr. Carrillo heard it, should have, could have responded to it in some fashion, then you can consider it as evidence."

The court further instructed the jury that the defendant could not be convicted based solely on his out-of-court statements or adoptive admissions. There must be other evidence showing the charged crime or lesser included offense was committed beyond a reasonable doubt. The court added that the jury was being instructed on rules about whether it should give the testimony any credence or importance, depending on how the jury viewed the circumstances.

B. Applicable Law

In determining whether hearsay testimony is admissible as an adoptive admission, the following principles apply: "Hearsay is 'evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.' (Evid. Code, § 1200, subd. (a).) Hearsay is not admissible unless it qualifies under some exception to the hearsay rule. Two hearsay exceptions are relevant here. A defendant's own hearsay statements are admissible. [Citations.] A statement by someone other than the defendant is admissible as an adoptive admission if the defendant 'with knowledge of the content thereof, has by words or other conduct manifested his adoption [of] or his belief in its truth.' (Evid. Code, § 1221; see *People v. Preston* (1973) 9 Cal.3d 308, 314 & fn. 3.)" (*People v. Davis* (2005) 36 Cal.4th 510, 535.)

As our high court in *People v. Preston* (1973) 9 Cal.3d 308, 313-314, explained, "If a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt."

"To warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1011.)

Thus, in determining whether the trial court erred in allowing Robles's testimony regarding Victor's statement to Julio, this court must determine whether there was sufficient evidence to support a reasonable jury finding that: "(a) the defendant heard and understood the statement under circumstances that normally would call for a response; and (b) by words or conduct, the defendant adopted the statement as true." (*People v. Davis, supra,* 36 Cal.4th at p. 535; see also Evid. Code, §§ 403, 1221; *People v. Preston, supra,* 9 Cal.3d at p. 314 & fn. 3.)

C. Discussion

Here, there was sufficient evidence defendant heard Victor's statement to Julio. Defendant was sitting nearby, around 12 feet away, when the statement was made.

Robles, who was also sitting nearby, overheard the statement, although we recognize he was about nine feet closer. Nevertheless, the jury could have reasonably concluded defendant heard the statement.

The jury also could have reasonably concluded Victor's statement was overheard by others sitting with him and Robles at the party, and that, under such circumstances, Robles's statement invited a response from defendant, if it was untrue. Defendant was sitting with others, with a shotgun in his lap, and was being accused of being there to collect a $100 debt from Aregon. It could reasonably be concluded that under such circumstances, by not denying the statement, defendant conceded the statement was true. The jury thus could reasonably find, defendant's silence constituted an adoptive admission.

Defendant cites *People v. Briggs* (1962) 58 Cal.2d 385, 408 (*Briggs*) and *People v. Lebell* (1979) 89 Cal.App.3d 772, 780 (*Lebell*), for the proposition the statement did not qualify as an adoptive admission because there was no showing defendant heard the statement, since the statement was not uttered to defendant, and the statement was made in the course of a conversation to which defendant was not a party. Also, there was no showing that defendant had any reason or opportunity to respond, due to defendant's location. (*Briggs* at pp. 408-409, *Lebell* at p. 780.)

In *Briggs*, *supra*, 58 Cal.2d 385, the defendant attempted to murder his wife and mother-in-law by causing their car to go over a cliff while his wife and mother-in-law were in the car. (*Id.* at pp. 397-398, 408.) The women survived and the defendant was found down the road, lying on the street, unable to talk coherently and drooling or

foaming at the mouth. He was placed in an ambulance and driven to the scene of the accident. (*Id.* at pp. 398, 408.) The mother-in-law was placed in the same ambulance. Before the mother-in-law was placed in the ambulance, she told a police officer at the scene that the defendant had tried to murder her and her daughter. (*Id.* at p. 408.) After the mother-in-law and officer got into the ambulance, the mother-in-law continued to accuse the defendant of attempted murder. When the defendant attempted to interrupt by asking about his wife, the officer told the defendant not to speak. (*Id.* at pp. 398, 408.)

At trial in *Briggs, supra,* 58 Cal.2d 385, the court permitted prosecution witnesses to testify to the mother-in-law's hearsay statements accusing defendant of attempted murder. The trial court concluded the statements fell within the adoptive admission hearsay exception. (*Id.* at p. 408.) On appeal, the *Briggs* court held the statements should not have been admitted under the exception "without some showing that the defendant heard, understood, had an opportunity to deny, and was in a position wherein he was called upon to make a denial." (*Ibid*.)

In discussing the adoptive admission exception, the *Briggs* court noted that "The exception to the hearsay rule is founded upon the proposition that the failure to deny under proper circumstances indicates a consciousness of guilt [citation]." (*Briggs, supra,* 58 Cal.2d at p. 408.) The *Briggs* court added: "[W]here there is some doubt as to whether the defendant was in a position to hear the statements, understand them, or make reply, the question of whether his failure to respond gave rise to an inference of acquiescence or guilty conscience is a matter for the trial court to determine, before admitting the testimony [citations]." (*Id.* at p. 408.)

Unlike in the instant case, in *Briggs, supra*, 58 Cal.2d 385, the trial court did not conduct an evidentiary hearing on the admissibility of the statements. (*Id.* at p. 408.) The court added that there was no evidence that the defendant heard the portion of the conversation outside the ambulance or was listening to the portion of the conversation inside the ambulance, addressed to another person. (*Id.* at pp. 408-409.)

More importantly, the instant case is distinguishable from *Briggs, supra*, 58 Cal.2d 385, in that an officer told the defendant in *Briggs* not to speak; the defendant was under custodial restraint of the police; and the defendant was told he was a crime suspect. (*Id.* at p. 409.) The *Briggs* court stated: "the hearsay statements may not be admitted under any guise if the circumstances indicate that defendant was not entirely free to reply if he chose to do so, or that his silence was attributable to the exercise of his constitutional privilege against self-incrimination [citation]. Here defendant was not only under the custodial restraint of the police, but he had already been told that he was suspected of crime, *and he had been told by the officer to keep quiet* when he attempted to interrupt. For this reason, alone, the so-called accusatory statements should not have been admitted." (*Briggs, supra*, 58 Cal.2d at p. 409.)

In *Lebell, supra,* 89 Cal.App.3d 772, cited by defendant, the defendant was convicted as an accessory to murder after the fact. Evidence was introduced at trial that the defendant's voice was heard in the background while the perpetrator of the murder was confessing his guilt in a recorded telephone call made from the defendant's home. (*Id.* at pp. 775-776.) The *Lebell* court held that the evidence of the defendant's presence, while the perpetrator was confessing to murder, was insufficient to establish an adoptive

admission that the defendant was an accessory after the fact to the murder. (*Id.* at p. 780.)

The *Lebell* court explained that, "While it is true that 'Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth' (Evid. Code, § 1221), it is likewise the case that, where, as here, the admissibility of evidence depends on the existence of a preliminary fact, the burden is upon the proponent thereof to establish such existence and that it is incumbent on the trial court to see such evidence is disregarded where the jury could not reasonably find that the preliminary fact exists. (Evid. Code, §§ 400-403.)" (*Lebell, supra,* 89 Cal.App.3d at p. 779.)

In *Lebell, supra,* 89 Cal.App.3d 772, the court concluded the evidence did not qualify as an adoptive admission because the witness's testimony was to the effect only that he heard the defendant's voice in the background while the perpetrator made incriminating statements. (*Id.* at pp. 779-780.) The *Lebell* court held the proffered evidence of adoption of the perpetrator's statements by defendant should have been excluded because there was nothing from which it could reasonably have been surmised the defendant heard what the perpetrator said or that, if he did, there was any reason or opportunity for him to respond. (*Id.* at p. 780.)

The instant case is distinguishable in that this case does not involve statements heard over the telephone, in which the defendant is not observed by the witness. Here,

Robles observed defendant while the hearsay statement was made. In addition, defendant had an opportunity to respond and deny Victor's statement.

The trial court in the instant case appropriately conducted a hearing to determine whether there was sufficient evidence to support a finding that Julio's statement to Garcia was admissible as an adoptive admission. Since there was sufficient evidence supporting a reasonable finding that defendant was in a position to hear the statements, understand them, and reply, the trial court did not abuse its discretion in admitting the evidence. (*Briggs, supra,* 58 Cal.2d at p. 408.)

There was testimony that defendant was within 12 feet of Julio when Julio made the statement. Even though music could be heard in the area, there was testimony that it was not extremely loud. Defendant had the opportunity to respond to the statement and deny that he was at the party merely to collect a debt. It was thus for the jury to decide, as instructed in accordance with the jury instructions on adoptive admissions, whether the statement qualified as an adoptive admission.

Defendant argues the statement was not an adoptive admission because the shooting had not yet occurred. But an adoptive admission need not be in the form of a direct accusation of a crime already committed in order to be admissible under Evidence Code section 1221, which defines the adoptive admission exception, states: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth" (Evid. Code, § 1221; see also *People v. Riel* (2000) 22 Cal.4th 1153, 1189 [statements by the defendant's two

coperpetrators to a third person, made while defendant sat silently on a couch a few feet away, regarding a robbery defendant and his coperpetrators had just committed, constituted an adoptive admission; similar additional statements made on another occasion by the two coperpetrators, in the defendant's presence, to the defendant's sister also constituted an adoptive admission]; *People v. Fauber* (1992) 2 Cal.4th 792, 852 [statements made by the defendant's two coperpetrators in the defendant's presence, regarding disposing of the victim's body and bicycle, and finding cocaine on the victim, admissible as an adoptive admission]; *People v. Preston, supra,* 9 Cal.3d at p. 314 [statements made in defendant's presence, in his bedroom, by a coperpetrator to a third person, that "'we went down to your mother's trailer house, and we broke in, and as we were leaving, we had everything ready to go out, and they came in, and there was an accident and . . . but they won't talk,'" and the defendant's comment, "'There wasn't much money'" (*Ibid*), constitute an adoptive admission, even though the statements were not accusatory on their face]; *People v. Cruz* (2008) 44 Cal.4th 636, 672 [evidence that when an employee of a rice mill, where the defendant was working, asked the codefendant which one of them "had done that wicked thing," the codefendant motioned with his head toward the defendant, who made no response, was admissible against the defendant as an adoptive admission].)

Victor's statement to Julio was the type of statement which one would expect defendant to deny if untrue since it suggested he was in the process of committing or about to commit a crime, that of collecting a debt by use of force. An inference could properly be drawn that defendant heard Victor's statement, understood its import, had the

opportunity to deny it, and chose to remain silent, despite the implication defendant was involved in criminal activity. We thus find no error in the admission of Victor's hearsay statement as an exception to the hearsay rule.

Defendant also argues there was no evidence defendant heard Victor's statement or had any opportunity or reason to respond. Defendant cites testimony that the statement was made while Garcia and Julio were listening to music in Garcia's car, and Victor was facing away from defendant when he made the statement in a soft tone. But these facts do not negate the possibility that defendant heard the statement. They raise a factual issue for the jury to decide.

D. Prejudice

Even if the trial court abused its discretion in admitting evidence of Victor's hearsay statement to Julio, such error was harmless. The trial court instructed the jury to consider Robles's testimony regarding Victor's statement to Julio only if the jury found the statement qualified as an adoptive admission. The court further explained to the jury what facts the jury must find in order for the statement to be considered as an adoptive admission. We presume the jury followed this instruction. (*People v. Turner* (1994) 8 Cal.4th 137, 190.)

Furthermore, evidence of Victor's statement to Julio, that defendant was at the party to collect a debt, was duplicative of other admissible evidence and there was overwhelming evidence supporting defendant's murder conviction, even in the absence of Robles's testimony regarding Victor's statement. There was evidence defendant attended the party uninvited, carrying a sawed-off shotgun; defendant told Victor shortly

after defendant arrived that he wanted to know where Aregon was because Aregon owed him money; right before the shooting, defendant was seen talking to Aregon while holding his gun; defendant was seen walking with Aregon to the site where Aregon was shot, within five minutes before the shooting; defendant was the last one seen with Aregon before the shooting; defendant was seen walking away, to his car, from where Aregon was shot right after witnesses heard a gun fired; after driving away from the party, defendant abandoned his car in another person's backyard; defendant's shotgun was discovered hidden in defendant's abandoned car.

Normally, we apply the *Watson* standard (*People v. Watson* (1956) 46 Cal.2d 818, 836) when considering evidentiary error, but under either *Watson* or *Chapman v. California* (1967) 386 U.S. 18, 24, we conclude, if there was error in allowing Robles's testimony regarding Victor's statement, it was harmless error.

3. Disposition

The judgment is affirmed.

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s/Hollenhorst
Acting P.J.

We concur:

s/King
J.

s/Miller
J.